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Nos. 82-437 and 82-635

In the Supreme Court of the United States

OCTOBER TERM, 1982

COUNTIES OF MAHNOMEN AND CLEARWATER, MINNESOTA, ET AL., PETITIONERS

v.

WHITE EARTH BAND OF CHIPPEWA INDIANS, ET AL.

JOSEPH N. ALEXANDER, ET AL., PETITIONERS

v.

WHITE EARTH BAND OF CHIPPEWA INDIANS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below properly held that petitioners are precluded from relitigating the reservation disestablishment issue decided by the Minnesota Supreme Court in *State of Minnesota* v. *Clark*, 282 N.W.2d 902 (1979) (en banc), cert. denied, 445 U.S. 904 (1980), as it affects the status of the White Earth Indian Reservation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a)[1] is reported at 683 F.2d 1129. The district court's May 30, 1980 memorandum and order (Pet. App. 47a-51a) is unreported. The final opinion of the district court (Pet. App. 23a-46a) is reported at 518 F. Supp. 527.

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[1]"Pet." and "Pet. App." refer to the petition and appendix in No. 82-437.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a) was entered on May 14, 1982. On July 17, 1982, Justice Blackmun entered an order extending the time within which to file a petition for a writ of certiorari to and including September 11, 1982. The petition in No. 82-437 was filed on September 10, 1982. The petition in No. 82-635 was filed on October 8, 1982.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the preclusive effect of a 1979 decision by the en banc Minnesota Supreme Court that the State of Minnesota is without authority to regulate hunting and fishing activities of Chippewa Indians in 32 townships comprising the diminished White Earth Reservation. *State of Minnesota* v. *Clark*, 282 N.W.2d 902, cert. denied, 445 U.S. 904 (1980).

The *Clark* litigation began in 1972, when two members of the White Earth Band of Chippewa Indians were arrested for violations of Minnesota state law regulating hunting and fishing. Between 1972 and 1976, 11 additional Band members were charged with similar violations, all of which

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[2]The petition in No. 82-635, which is styled a "cross-petition," was filed by the State of Minnesota, certain State officials and Becker County, Minnesota, ostensibly for the sole purpose of ensuring that those parties would receive the benefit of any favorable ruling the petitioners in No. 82-437 might obtain (see 82-635 Pet. 7-8). In our view, however, the petition in No. 82-635 is not a proper cross-petition under Rules 19.5 and 19.6 of the Rules of this Court because it presents the identical issue presented by the petitioners in No. 82-437. Accordingly, the additional 30 days for filing a cross-petition provided by Rule 19.5 do not inure to the benefit of the petitioners in No. 82-635 and their petition, which was filed more than 90 days after entry of the judgment of the court of appeals, is therefore out of time. Nevertheless, because both petitions present the same issue, this brief is responsive to both filings.

were alleged to have occurred on land located within the 32 townships of the White Earth Reservation. 282 N.W.2d at 903-904.

Following the initiation of the state prosecutions, the White Earth Band, on March 4, 1974, and the United States, on December 5, 1974, filed complaints in the United States District Court for the District of Minnesota against the State of Minnesota and various Minnesota state officials seeking declaratory and injunctive relief to the effect that the State lacks jurisdiction to regulate Indian hunting, fishing, trapping, and gathering within the White Earth Reservation. [3] Three Minnesota counties, Becker, Clearwater and Mahnomen, and four individual owners of land located within the boundaries of the Reservation were permitted to intervene as defendants in the Band's action. Subsequently, the district court consolidated the two federal actions and held them in abeyance, by agreement of the parties, while the issue was litigated through the state court system in the context of the *Clark* prosecutions, in which all of the parties to the federal proceedings actively participated (Pet. App. 6a-7a, 25a, 49a).

The Minnesota Supreme Court issued its decision in *Clark* on August 3, 1979, concluding that the State lacks jurisdiction to enforce its fish and game laws against enrolled members of the White Earth Band within 32 of the 36 townships comprising the White Earth Reservation as established by the Treaty with the Chippewa Indians, Mar. 19, 1867, 16 Stat. 719 (Treaty of Mar. 19, 1867).[4]

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[3]The Band also sought a declaration that it and the Chippewa Tribe have exclusive jurisdiction to regulate those activities by non-members within the reservation (Pet. App. 7a).

[4]The court expressly limited its decision to the 32 townships. See 282 N.W.2d at 906 n.13. The four remaining townships of the original reservation were ceded by the Indians to the United States in 1889 and have a history distinct from that of the 32 (see page 10, *infra*). Following

Specifically, the court held (282 N.W.2d at 905-908) that the Act of Jan. 14, 1889, ch. 24, 25 Stat. 642 *et seq.* (the Nelson Act), had not disestablished the White Earth Reservation and that, therefore, the lands within the reservation's boundaries constitute "Indian country," as defined by 18 U.S.C. 1151(a). The court further found (282 N.W.2d at 908-909) that the Indians possess hunting and fishing rights under the Treaty with the Chippewa Indians, May 7, 1864, 13 Stat. 693, and the Treaty of Mar. 19, 1867, 16 Stat. 719. Accordingly, the court concluded, application of the State's regulatory authority to these Indian activities is precluded by 18 U.S.C. 1162(b), which provides that Minnesota's jurisdiction over criminal offenses committed within "Indian country" shall not "deprive any Indian or any Indian tribe, band or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

On May 30, 1980, the district court in the consolidated federal cases granted the Band's motion for an order precluding relitigation of the issues decided in *Clark* (Pet. App. 47a-51a). The district court subsequently issued a final memorandum and order disposing of the remaining issues in that case (*id.* at 23a-46a).[5]

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the decision in *Clark*, the United States amended its complaint to reduce the amount of land over which it claimed the State lacked jurisdiction to regulate the gaming activities of the Band and Tribe from 36 to 32 townships, so that its amended complaint sought no greater relief than that granted in *Clark* (Pet. App. 26a). The Band continued to claim a right to be free from State regulation of hunting and fishing on all 36 townships of the original reservation.

[5]Relying on this Court's decision in *Montana* v. *United States*, 450 U.S. 544 (1981), the court held (Pet. App. 26a-27a) that the Band lacks jurisdiction to regulate hunting, fishing, trapping and wild rice gathering by nonmembers of the Band on reservation lands held in fee by non-Indians. In addition, the court held that the White Earth Reservation does not include the four northeastern townships ceded to the

The court of appeals affirmed the district court in all respects (Pet. App. 1a-22a).[6] Specifically, the court rejected petitioners' argument that the doctrine of collateral estoppel should not preclude relitigation of the issues decided in *Clark* because its application would be unjust and contrary to the underlying public interest (*id.* at 9a-13a).

ARGUMENT

Throughout the proceedings in this case, petitioners have conceded that all the technical prerequisites to application of the doctrine of collateral estoppel are satisfied (see Pet. App. 9a-10a, 49a).[7] They nevertheless contend (Pet. 8-20) that the courts below erred in applying that doctrine to preclude relitigation of the issue of reservation disestablishment decided in *Clark*. Petitioners' claim is without merit and, in any event, the question they present has little significance beyond this particular case. Further review by this Court is therefore not warranted.

United States in 1889 pursuant to the Nelson Act (Pet. App. 27a-35a); that the Band has jurisdiction to regulate (but not through the imposition of criminal or quasi-criminal sanctions) hunting, fishing, trapping and wild rice gathering by non-members on land owned by or held in trust for the Band or individual Indians (*id.* at 35a-40a); and that the State also has authority to regulate these activities by non-members on Indian-owned or trust land (*id.* at 40a-45a).

[6]The State parties and intervening counties and individuals appealed from the district court's order precluding relitigation of the disestablishment issue decided in *Clark*. The Band appealed from the district court's rulings that four townships were not included in the White Earth Reservation and that the State also had authority to regulate the hunting, fishing, trapping and wild rice gathering activities of non-members of the Band on Indian-owned or trust lands (see note 5, *supra*). Pet. App. 5a.

[7]As the district court noted (Pet. App. 49a), "all the parties participated in the state action, the issues were fully and fairly litigated, the state court action resulted in a valid and final judgment, and the resolution of the issues was essential to that judgment." See also *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979).

1a. Petitioners' principal contention (Pet. 8-13) is that the legal principles controlling the disestablishment issue have changed significantly since *Clark* was decided and that an exception to the issue preclusion rules therefore is warranted under *Commissioner* v. *Sunnen*, 333 U.S. 591, 599 (1948). See also *Montana* v. *United States*, 440 U.S. 147, 161 (1979). In support of this claim, petitioners rely (Pet. 11-13) on *United States* v. *State of Minnesota*, 466 F. Supp. 1382 (D. Minn. 1979), aff'd *sub nom. Red Lake Band of Chippewa Indians* v. *State of Minnesota*, 614 F.2d 1161 (8th Cir.) (per curiam), cert. denied, 449 U.S. 905 (1980), which they claim represents the culmination of a change in the law assertedly begun in *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977), and *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975).

As the court of appeals noted (Pet. App. 11a), however, the *Rosebud* and *DeCoteau* cases, as well as the district court's decision in *United States* v. *State of Minnesota*, *supra*, all were decided prior to the *Clark* decision and, indeed, were cited and discussed by the Minnesota Supreme Court in its opinion in that case. 282 N.W.2d at 906, 907, 908. While the decision of the court of appeals in *Red Lake Band*, *supra*, was rendered after *Clark*, that one-page per curiam opinion, which merely affirmed "on the basis of the trial court's well reasoned decision" (614 F.2d at 1162), cannot be construed as constituting a significant change in the law, particularly because it is the language of the district court opinion on which petitioners are relying (Pet. 13) and because the *Clark* court explicitly followed that district court decision to the extent it was applicable. See 282 N.W.2d at 908. Petitioners' contention thus reduces to an argument that the *Clark* court misapplied existing law. But an allegation that a decision depends on an erroneous view of the law provides no exception to the doctrine of collateral estoppel. See *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981).

b. In any event, the decision in *Clark* is not inconsistent with the cases cited by petitioners. Indeed, the Minnesota Supreme Court expressly relied on *DeCoteau* v. *District County Court, supra,* 420 U.S. at 444-445, and *Rosebud Sioux Tribe* v. *Kneip, supra,* 430 U.S. at 586-587, in holding (282 N.W.2d at 907) that "the standard to be applied in resolving the disestablishment issue is whether a clear congressional intent to terminate the reservation is discernible either from the face of the act, the surrounding circumstances, or the act's legislative history."[8] Applying this standard, the court examined the records of negotiations with the Indians incident to implementation of the Nelson Act and concluded that neither the government nor the Indian negotiators believed the Act would have the effect of disestablishing the White Earth Reservation. See 282 N.W.2d at 907 & n.14.

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[8]The findings of disestablishment in *DeCoteau* and *Rosebud* were based on statutes other than the Nelson Act, which is at issue here. Rather, those cases involved the Act of Mar. 3, 1891, (ch. 543, 26 Stat. 989 *et seq.*), and the Acts of Apr. 23, 1904 (ch. 1484, 33 Stat. 254 *et seq.*), Mar. 2, 1907 (ch. 2536, 34 Stat. 1230 *et seq.*) and May 30, 1910 (ch. 260, 36 Stat. 448 *et seq.*), respectively. The *Clark* court also distinguished *DeCoteau* on the following grounds (282 N.W.2d at 908; footnote omitted):

> The most significant distinction between *DeCoteau* and the present case lies in the differing understandings of the Lake Traverse and the White Earth Indians. In *DeCoteau,* the Court cited a newspaper account of the 1889 negotiations reporting that the Sisseton-Wahpeton Indians had stated, " 'We never thought to keep this reservation for our lifetime.' " 420 U.S. 433, 95 S. Ct. 1087, 43 L.Ed.2d 307. In sharp contrast, the defendants here have persuasively shown that the White Earth Indians desired to keep the reservation intact and understood that it would remain so except for the four townships of pine preserves ceded outright to the United States. Accordingly, we believe that the two cases are markedly different from one another and thus the *DeCoteau* holding is not controlling in this case.

Moreover, petitioners err in suggesting (Pet. 11) that *United States* v. *State of Minnesota, supra,* touches on the question of the disestablishment of the 32 townships presented here. The issue in *Minnesota* was whether the Red Lake Band retained hunting and fishing rights in lands the Band had ceded to the federal government in 1889 and 1904. 466 F. Supp. at 1383, 1385. Accordingly while that case may have some relevance to the question of the Band's hunting and fishing rights in the four northeastern townships of the White Earth Reservation that were ceded pursuant to the Nelson Act (see note 4, *supra*; page 10, *infra*), it has little bearing on the question of Indian rights in the 32 townships that were never ceded.

Furthermore, contrary to petitioners' assertion (Pet. 11), the statement in *Minnesota* that the purpose of the Nelson Act was to "restore the land to the public domain" (466 F. Supp. at 1386 n.1, 1387), is no indication that the *Minnesota* court viewed the Nelson Act as accomplishing reservation disestablishment. Viewed in the context of the land cessions with which that case was concerned, the statement merely reflects the court's conclusion that, in selling lands to the federal government, the Indians had forfeited their hunting and fishing rights therein.

2. Petitioners also contend (Pet. 13-14, 18-19) that precluding relitigation of the issue decided in *Clark* will serve only to perpetuate inconsistent decisionmaking with respect to the disestablishment effect of the Nelson Act. But *DeCoteau* and *Rosebud* make clear that different conclusions concerning the disestablishment vel non of particular reservations inevitably will result, not because of differing interpretations of the law, but from the different factual situations surrounding the transactions at issue. The teaching of those cases is that, with respect to a particular reservation and particular tribe or band, congressional intent

and Indian understanding are to be gleaned from the "surrounding circumstances," as well as from the language of the congressional enactment. See *Rosebud Sioux Tribe* v. *Kneip, supra,* 430 U.S. at 586-587; *DeCoteau* v. *District County Court, supra,* 420 U.S. at 444. This is particularly true with respect to the Nelson Act, which treated various bands or tribes and reservations differently and which contemplated that separate agreements would be negotiated with the individual tribes or bands. See Sections 1 and 3 of the Nelson Act, 25 Stat. 642-643.[9] Accordingly, the suggestion that the Nelson Act requires a uniform conclusion regarding disestablishment of all the Indian reservations with which the Act deals is without foundation. As the court of appeals noted (Pet. App. 12a-13a), there is no inconsistency where different factual situations compel different results.

Once a court of competent jurisdiction has determined the question of disestablishment of a given reservation in the context of its particular historical and factual setting, relitigation of that status would undermine reliance on judicial decisionmaking. See *Allen* v. *McCurry,* 449 U.S. 90, 95-96 (1980). Contrary to petitioners' claims, therefore, the need for consistency militates in favor of applying the doctrine of collateral estoppel here.[10]

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[9]Moreover, the White Earth Reservation has a unique historical status. The Nelson Act contemplated that the various bands and tribes of the Chippewa Indians in Minnesota, with the exception of the Chippewa on the Red Lake Reservation, would leave their reservations and move to the White Earth Reservation. See Section 3 of the Act, 25 Stat. 643.

[10]We note that refusal to apply the doctrine in this case would result in a direct federal-state conflict if, on relitigation, petitioners secured a favorable judgment on the disestablishment question. In that case, a judgment by the highest state court would prohibit the State from regulating or interfering with Band hunting and fishing activities on the 32 townships whereas an outstanding federal court judgment would subject Band hunting and fishing to state regulation.

3. Finally, petitioners argue (Pet. 14-18) that, because the question of the reservation status of the four northeastern townships remained before the district court,[11] reexamination of the status of the 32 townships would not have worked an unnecessary or uneconomical use of judicial or private resources. Accordingly, petitioners contend, precluding relitigation did not serve the purposes of the doctrine of collateral estoppel. Petitioners' claim founders on the realities of this case. The four townships ("pine lands") have a significantly different history from that of the 32, and their status therefore presents a distinct and separate issue. They were the subject of different provisions in the Nelson Act and the agreement pursuant to it. Nelson Act, Section 4, 25 Stat. 643-644; H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. 37 (1890). In addition, the four townships were not set apart for allotments to Indians, and no allotments were ever made in them (Pet. App. 12a, 34a). As petitioners acknowledge (Pet. 16), the four townships were ceded in 1889, whereas the remaining 32 townships were expressly reserved.

Conceding (Pet. 17) that the 32 townships and the four townships are the subjects of different provisions of the Nelson Act, petitioners nevertheless insist that, because "the same legislative documentation and the same administrative materials" are critical to both issues, relitigation of the status of the 32 townships would not have unnecessarily taxed judicial and private resources (Pet. 18). Under this theory, if a party raised a single issue not previously litigated whose disposition turned on documents that would be significant in deciding a number of other issues already disposed of, the latter issues could be relitigated and the doctrine of collateral estoppel circumvented simply because of the relevance of these documents. But such a result would

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[11]See note 5, *supra*.

undermine public confidence in judicial decisionmaking and would afford litigants " 'more than one full and fair opportunity for judicial resolution of the same issue.' " *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 328 (1979), quoting *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 328 (1971). Moreover, insofar as judicial resources are primarily expended not in collecting the relevant documents or even in reading through them, but rather in analyzing and applying them to a particular issue, acceptance of petitioners' "overlapping documentation" theory would result in the unnecessary expenditure of judicial as well as private resources.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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